IN THE HIGH COURT OF UTTARANCHAL, AT NAINITAL

Criminal Appeal No. 636 of 2001
(Old No. 367/1997)

Banwari Lal
S/o Pooran Lal ……Appellant

Versus

State ……..Respondent

Sri J.S. Virk learned counsel for the appellant.
Sri G.S. Sandhu learned AGA.

Hon'ble J.C.S. Rawat, J.

This is a criminal appeal under section 374 of the Code of Criminal Procedure against the judgment and order dated 05.06.1995 passed by IInd Additional Sessions Judge, Nainital in Crl. Special S.T. No. 119/1993, whereby the IInd Addl. Sessions Judge has convicted the appellant and sentenced to undergo RI for ten years under section 20(B) of N.D.P.S. Act.

2. Brief facts of the prosecution case as emerged out from the record are that on 23.09.1992 the police party comprising of S.I. – Sri Trilok Chandra Sharma, constable Sri Mahendra Pal and constable Sri Madan Lal were on patrolling duty. At about 11:00 p.m. they saw the appellant and he was intercepted by the police party but he tried to escape from them. The police party apprehended the appellant and conducted the search of the appellant. On being made search of the appellant, the police recovered 400 gm. of charas from his possession. A recovery memo was prepared on the spot regarding the recovery of charas from the appellant and copy of the recovery memo was given to the appellant.

3. The police party returned to the police station and lodged the report against the appellant. The investigation was handed over to Sri Umesh Chand- S.I. The recovered charas was sent for chemical examination at Agra. The said report reveals that sample was found to be charas. The investigating was taken up as usual which culminated into the submission of chargesheet.

4. Charge under section 20-B of the N.D.P.S. Act was framed against the appellant. The appellant denied the charge and claimed trial.

5. The prosecution in order to support his case produced the evidence of PW1-Constable Sri Mahendra Pal Singh, P.W.2-Constable Sri Madan Lal – constable. Both the witnesses stated in their statements that they were on patrol duty and recovered 400 gm. illicit charas from the possession of the appellant-Banwari, Lal for which he has no licence. The prosecution has produced the evidence of PW4-Constable Ram Bharose who deposed that he took the sample of recovered contraband articles for chemical examination to Agra. PW3 – S.I. Umesh Chandra was the I.O., who submitted the chargesheet against the appellants after investigation. The appellant in his statement under section 313 Cr. P.C. has denied the prosecution story and stated that he has been implicated falsely due to enmity.

6. The learned IInd Addl. Sessions Judge, Nainital on his appreciation of the evidence on record held that the prosecution had proved its case against the appellant beyond reasonable doubt and sentenced him to undergo RI for ten years under Section 20-B N.D.P.S. Act. The appellant denied the charges levelled against him and claimed trial.

7. I have heard Sri J.S. Virk learned counsel for the appellant and Sri G.S. Sandhu learned A.G.A. and have perused the material on record.

8. Learned counsel for the appellant contended that there was non-compliance under Section 57 of the Act. He submits that an obligation is cast on the prosecution while making an arrest of seizure, the officer should make full report of all the particulars of such arrest of seizure and send it to his immediate superior officer within 48 hours of such arrest or seizure.

9. It is true that the communication to the immediate superior has not been made in the form of a report even they had not shown by the evidence that the copies of the FIR alongwith other records regarding the arrest of the appellant and seizure of the contraband articles were sent to

his superior officer immediately after registering the said case. Violation of these provisions would not ipso facto violate the trial or conviction. However, the I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding the arrest of the accused or seizure of the article.

10. The prosecution has not produced the evidence of S.I. Trilok Chandra Sharma P.W.3 who was leading the police party and conducted the search in presence of constable Mahendra Pal Singh (PW1) and Madan Lal (PW2). The failure to inform the superior officers will have a bearing on appreciation of evidence regarding the arrest of the accused and seizure of articles. In case a contraband article would have been seized, S.I. would had definitely inform the superior officers and no compliance of section 57 of the Act gives an adverse inference that such recovery did not take place as alleged by the prosecution. This fact further stands corroborated by the evidence of Constable Ram Bharose (PW4) who stated in his cross examination that he did not take the contraband articles from the Malkhana of P.S. He received the article from the police station. There is no link evidence that the contraband article was received in sealed condition from the Malkhana. Thus this fact further creates a doubt about the prosecution story. It has been held in **Gurbax Singh Vs. State of Haryana** 2001 SCC (Cri) 426:-

> *"9. The learned counsel for the appellant next contended that from the evidence it is apparent that the IO has not followed the procedure prescribed under section 52, 55 and 57 of the NDPS Act. May be that the IO had no knowledge about the operation of the NDPS Act on the date of the incident as he recorded the FIR under sections 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Section 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions of such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, IO has admitted that seal which was affixed on the muddamal article was handed over to witness PW1 and was kept with him for 10 days. He has also*

admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under section 55 of the NDPS Act. The prosecution has not led any evidence whether the chemical analyzer received the sample with proper intact seals. It creates a doubt whether the sample were sent to the chemical analyzer. Further, it is apparent that the IO has not followed the procedure prescribed under section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the IO, particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW2 SI.IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution. In our view, it would not be safe to convict the appellant for a serious offence of possessing poppy husk."

11. It has been held in **Thandi Ram Vs. State of Haryana 2000 (1) SCC p/318:-**

"*On appeal, the High Court confirmed the conviction and sentence and hence the present appeal. Before the High Court it was urged on behalf of the appellant that the provisions of Section 50, 52, 55 and 57 of the Act had not been complied with. The High Court considered these provisions but was of the opinion that the officer concerned having accidentally recovered the article in question, the question of following Section 50 did not arise. So far as the non-compliance with the other provisions are concerned, the High Court was of the view that even though the provisions of Section 55 may be mandatory but no prejudice having been caused the conviction does not get vitiated. Learned counsel for the appellant contended that in view of the decision of this Court in the case of* ***State of Punjab Vs. Balbir Singh {See 1994 (3) SCC p299, 1994 SCC (Cri)***

p634, AIR 1994 SC 1872} *as well as three Judge Bench decision in the case of* ***Mohinder Kumar Vs. State Panaji, Goa {See 1998 (8) SCC 655, AIR 1995 SC 1157},*** *the conclusion of the High Court is not sustainable in law and the conviction of the appellant cannot be sustained. We find sufficient force in the aforesaid contention of the learned counsel for the appellant. In view of the pronouncement of this Court in the aforesaid cases and in view of the finding as recorded in the judgment of the High Court that provisions of Sections 55 an 57 have not been complied with the conviction is bad in law."*

12. in view of the forgoing discussion, I come to the conclusion that the prosecution has failed to establish the charge levelled against the appellant. Therefore, the appeal is allowed and the judgment and order dated 05.06.1995 passed by the IInd Addl. Sessions Judge is set aside. The appellant is acquitted of the charge under section 20(B) of the N.D.P.S. Act. Therefore, he need not surrender. His bail bond is cancelled and sureties discharged.

(J.C.S. Rawat, J.)

August 05, 2004
LSR